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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TONY TORRES, Defendant and Appellant.	F057749 (Super. Ct. No. 08CM7337) **O P I N I O N**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kings County. Steven D. Barnes, Judge.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Ivan P. Marrs, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Cornell, J., and Kane, J.

A jury convicted appellant, Tony Torres, of possession of a weapon, viz., a sharp instrument, while confined in a state prison (§ Pen. Code, 4502, subd. (a)),[1] but acquitted him of assault with a deadly weapon on a prison inmate (§ 4501). In a separate proceeding, appellant admitted a "strike" allegation.[2]

The court imposed a prison term of eight years, consisting of the four-year upper term, doubled pursuant to the three strikes law (§§ 667, subd. (e)(1); 1170.12, subd. (c)(1)), and ordered that term to run consecutively to the term appellant was serving at the time of the instant offense.

On appeal, appellant's sole contention is that the court erred in failing to instruct the jury on the defense of transitory possession with respect to the charge of possession of a weapon in prison. We will reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Facts

On March 15, 2008 (March 15), appellant and David Hernandez, inmates in the Substance Abuse Treatment Facility (SATF) in Corcoran State Prison, shared cell No. 141. Appellant had the upper bunk.

Correctional Officer David Peden testified he was on duty on March 15 when, at approximately 8:10 a.m., he saw that Hernandez, who was standing at his cell window, had blood on his face and shirt and was moving his arms in an attempt to get the officer's attention. Appellant was standing at the back of the cell.

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[1] Except as otherwise indicated, all statutory references are to the Penal Code.

[2] We use the term "strike" as a synonym for "prior felony conviction" within the meaning of the "three strikes" law (§§ 667, subds. (b)-(i); 1170.12), i.e., a prior felony conviction or juvenile adjudication that subjects a defendant to the increased punishment specified in the three strikes law.

Correctional Officer Craig Knight testified he responded to the scene and found Hernandez lying face down in the cell with blood on his arms and face. Appellant was sitting on the top bunk in the cell. He had blood on his hands.

Officer Peden further testified to the following: Hernandez exited the cell first. He was bleeding profusely from lacerations to his left arm, which required sutures. He had also suffered lacerations to his face and hands. Appellant came out of the cell next. He had scratches and abrasions on his hands.

David Shaw, Jr., a registered nurse working at the SATF on March 15, testified on direct examination that shortly after 8:00 a.m. on that date, he treated appellant for injuries, and that as he did so, appellant stated: "'Cellie think this is my house. I don't like to have a cellie. I don't think I will ever have to worry about that. He tried to put hands on me. He was too slow.'" On cross-examination, Shaw clarified that appellant stated *that Hernandez stated*, "'Cellie think this is my house.'"[3]

Correctional Officer James Kalkis testified that he spoke to Hernandez on March 15, as Hernandez was being treated for his wounds, and that Hernandez told him the following: Hernandez and appellant "weren't getting along." Appellant was "always getting into [Hernandez's] personal property without asking." Hernandez was unable to find a piece of sandpaper that belonged to him. He asked appellant where the sandpaper was; the two started to argue; Hernandez challenged appellant to a fight; and appellant "jumped off of the top bunk and started to slash" Hernandez with a razor blade.

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3 Shaw's testimony was at odds with the prosecution's offer of proof as what that testimony would be. At a hearing outside the presence of the jury immediately preceding this testimony, the prosecutor stated Shaw would testify to the following: Appellant told Shaw that Hernandez stated, "'Cellie think this is my house. I don't like to have a cellie. I don't think I will ever have to worry about that.'" Appellant then said, "'He tried to put hands on me. He was too slow.'"

Hernandez, however, testified to the following: He and appellant "got along." They had no "disagreements or fights." Appellant never "attack[ed]" or "cut" him. On March 15, he cut himself with a razor blade. He did not remember why he cut himself. The event was "traumatic" and Hernandez had "shut [it] out of [his] mind." He did not remember talking to Officer Kalkis.

Appellant testified to the following: On March 15, Hernandez began "swinging his arms" and talking out loud to himself. Appellant was reclining on his bunk, watching television, but he looked up and saw that Hernandez was bleeding from his right hand. Next, he saw Hernandez "cutting himself," at which point appellant, concerned for his cellmate's safety and afraid he (appellant) would be blamed for Hernandez's injuries, "jumped down from the bunk" and "grabbed [Hernandez] by the arm" so that he (appellant) "could take the blade from him." Appellant succeeded in "grabb[ing] the blade," at which point he "tossed it behind [him]." He did not look where he threw it. He thought it landed on the floor, approximately three feet away from Hernandez. As appellant was "stepping back" he saw the blade on the floor. Appellant then told Hernandez to "get some [medical] attention." Hernandez "was trying to wave at the [correctional officer]" but the officer was "not around," so Hernandez "called an inmate and the inmate called the tower." At that point, appellant got back up on his bunk.

Correctional Officer Yancy Arnold testified to the following: On March 15 at approximately 8:00 a.m., responding to a "personal alarm," he went to cell No. 141. After "secur[ing] the crime scene, he searched the cell and found a razor blade on the top bunk near the head of the bed. He found no other items that could be used as weapons.

Appellant testified he did not see Hernandez throw the blade onto his bunk and he did not know how the blade got there.

Defense Theory

In closing argument to the jury, defense counsel argued: "Mr. Torres did not willfully possess a weapon. He grabbed it out of Mr. Hernandez's hand. He did not willfully and maliciously attack him. He saw what was going on and tried to stop it, and was somewhat successful after a short issue that happened with Mr. Hernandez."

DISCUSSION

A trial court has a sua sponte duty to instruct on (1) a defense theory that is relied on by the defense and (2) on any theory that is supported by substantial evidence that is not inconsistent with the defense theory. (*People v. Abilez* (2007) 41 Cal.4th 472, 517.) Appellant argues that under the second of these principles, the trial court was required to instruct the jury on the defense of transitory possession, and that the court's failure to do so constituted reversible error.[4] The People counter that (1) the defense of transitory possession does not apply to the offense of possession of a weapon *in prison*, and that in any event, (2) the defense was not supported by substantial evidence.[5] For reasons we shall explain, we agree with appellant.

We address first the question of whether the transitory possession defense can apply to a charge of possession of a weapon in prison. The genesis of the defense is

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[4] The pattern jury instruction for section 4502 contains no reference to this defense. However, CALCRIM No. 2510, the pattern instruction for "Possession of Firearm by Person Prohibited Due to Conviction," states that such possession is not unlawful if the defendant can prove "the defense of momentary possession." To prove that defense, the instruction continues, the defendant must prove, by a preponderance of the evidence, the following three elements: (1) he or she "possessed the firearm only for a momentary or transitory period"; (2) he or she "possessed the firearm in order to (abandon[,]/[or] dispose of[,]/[or] destroy it"; and (3) he or she "did not intend to prevent law enforcement officials from seizing the firearm."

[5] There is no dispute that the transitory possession defense is consistent with the theory of appellant's defense.

People v. Mijares (1971) 6 Cal.3d 415 (*Mijares*), which arose out of a prosecution for possession of heroin. As later summarized by our Supreme Court in *People v. Martin* (2001) 25 Cal.4th 1180, 1185 (*Martin*), *Mijares* held that although "[i]ntent to possess the controlled substance for a minimally prescribed period of time has never been an element of the statutes criminalizing simple possession," "under limited circumstances, facts showing only a 'brief,' 'transitory' or 'momentary' possession could constitute a complete defense to the crime."

The court in *Martin* explained: "'When a defendant relies on the *Mijares* defense, he or she essentially admits the commission of the offense of simple possession of narcotics .... However, the defendant additionally asserts that he or she possessed the narcotics for the limited purpose of disposal, abandonment, or destruction. *Mijares* does not serve to negate an element of the offense of possession of narcotics. Instead, it offers a judicially created exception of lawful possession under certain specific circumstances as a matter of public policy, similar to the defenses of entrapment and necessity.'" (*Martin, supra*, 25 Cal.4th at p. 1191.) Specifically, those specific circumstances are "brief or transitory possession of narcotics with the intent to dispose of the contraband ...." (*Id*. at p. 1191, fn. 9, italics omitted.)

The court in *Martin* explained the reasoning of *Mijares* as follows: "'[I]n throwing the heroin out of the car, defendant Mijares maintained momentary possession for the sole purpose of putting an end to the unlawful possession of [his friend]." [Citation.] ... We reasoned that if such transitory control were to constitute possession, 'manifest injustice to admittedly innocent individuals' could result. [Citation.] As an example, we referred to the witness who saw the defendant throw the object. Had she 'briefly picked up the package and identified the substance as heroin and then placed the outfit back on the ground, during the time after which she had realized its narcotic character she, too, would have been guilty of possession under an unduly strict reading of

[the statute], notwithstanding the fact that her transitory handling of the contraband might have been motivated solely by curiosity.' [Citation.] We refused to 'read the possession statutes to authorize convictions under such guileless circumstances.' [Citation.] We further relied on certain federal court decisions that had rejected the notion that criminal possession under federal statutes includes such transitory activity as the momentary handling of drugs. We noted that the Seventh Circuit Court of Appeals had reversed a federal narcotics conviction, declaring, '"'To "possess" means to have actual control, care and management of, and not a passing control, fleeting and shadowy in its nature.'"' [Citation.]" (*Martin*, *supra*, 25 Cal.4th at pp. 1185-1186.)

After *Mijares* was decided, two appellate cases were published which dealt with transitory possession in a different context, felons in possession of firearms. In the first of these cases, *People v. Pepper* (1996) 41 Cal.App.4th 1029 (*Pepper*), the court held that "section 12021 prohibits a convicted felon from possessing a firearm even momentarily except in self-defense, in defense of others, or as a result of legal necessity." (*Id*. at p. 1038.) The court reasoned that innocent possession could not occur because one would readily know the nature and purpose of a firearm, and one could not legitimately possess a firearm momentarily to prevent its illegal possession by another. (*Ibid*.)

However, in the second case, *People v. Hurtado* (1996) 47 Cal.App.4th 805 (*Hurtado*), the court declined to "adopt the strict liability approach set forth in *Pepper*" (*Id*. at p. 813), and held that the "'momentary possession' defense recognized in *Mijares* extends to possession of a firearm by a felon offenses" (*Id*. at p. 814). The court reasoned: "Firearms and controlled substances are admittedly dangerous items; it is the retention of these items, rather than the brief possession for disposal or self-protection, which poses the danger which is criminalized by the relevant statutes." (*Ibid*.)

Subsequently, in *Martin*, our Supreme Court endorsed the *Hurtado* view. The court in *Martin* disapproved a jury instruction which broadened the application of the

defense by stating that the duration possession was merely a factor for the jury to consider in determining whether the possession was for the sole purpose of disposal. (*Martin, supra,* 25 Cal.4th at pp. 1187, 1191-1192.) In the portion of the opinion relevant to the issue before us, the court, implicitly rejecting the *Pepper* "strict liability" approach, stated, "We agree with the *Hurtado* court that recognition of a 'momentary possession' defense serves the salutary purpose and sound public policy of encouraging disposal and discouraging retention of dangerous items such as controlled substances *and firearms*." (*Id.* at p. 1191, italics added.)

Thus, *Hurtado* held, and in *Martin* our Supreme Court indicated in dicta, that the transitory possession defense is not limited to drug possession offenses, and can be extended to weapon possession offenses. However, the People argue that that defense should not be extended to the offense of possession of a weapon *in prison*. The People base this claim on this court's decision in *People v. Brown* (2000) 82 Cal.App.4th 736 (*Brown*), the only published case to address the application of the transitory possession defense to the crime of possessing a weapon in prison in violation of section 4502, subdivision (a).

In that case, the defendant, Brown, was found, in a prison yard, carrying a weapon made out of a razor blade. In support of his request for a transitory possession instruction, he made an offer of proof that he would testify "he came upon the object on the ground, was concerned for his own safety and the safety of others and therefore picked it up, put it into his pocket and was proceeding to the outdoor toilet to dispose of it." (*Id*. at p. 739.) This court held that the trial court did not err in not instructing the jury as to the transitory possession defense. (*Id*. at p. 740.)

This court observed: "The fact that the Legislature has made the possession of *any* weapon, not just firearms, in a penal institution a felony is indicative of the danger weapons present in such a facility. [¶] ... [T]he nature of a firearm is readily apparent;

likewise here, the nature of a razor blade with an inmate-manufactured holder is also readily apparent. It is a weapon with the sole purpose of inflicting injury on someone else. It cannot be 'innocently' possessed or picked up out of curiosity. [¶] The factors which may militate toward temporary possession for disposal purposes or for the protection of others as recognized in [*Hurtado*] do not apply in a penal institution. Defendant could have simply alerted a guard to the existence of the weapon without picking it up. We do not believe the Legislature, by the enactment of ... section 4502, sanctioned self-help or knowing possession of weapons *under the circumstances presented here*. Whether there can *ever* be a circumstance justifying temporary possession in a penal institution is a question not presently before us. We simply conclude the judge was correct in denying [the defense request to instruct the jury on the transitory possession defense]." (*Brown*, *supra*, 82 Cal.App.4th at pp. 739-740, second italics added.)

The instant case is distinguishable. According to appellant's testimony, Hernandez was in the process of mutilating himself when appellant jumped down from his bunk, grabbed the razor blade away from Hernandez, and immediately tossed it away. If, assuming that appellant truthfully described the situation he was facing, he had taken the course of action endorsed in *Brown*—simply alerting a guard, and then, without intervening, standing by waiting for a response—Hernandez could have suffered further, and more severe, injury. Moreover, Brown's act—according to his offer of proof—of walking across a prison yard, where presumably other prisoners could be present, in possession of a weapon, posed more of a danger than the act of grabbing the blade from a cellmate intent on harming himself and immediately tossing it away, inside the cell, under circumstances where the arrival of guards was imminent.

In our view, notwithstanding the danger presented by the mere presence of a weapon in prison, imposing criminal liability on an inmate who momentarily possesses a

weapon under the circumstances described by appellant would result in a "manifest injustice." (*Mijares, supra,* 6 Cal.3d at p. 422.) Therefore, in the instant case, under appellant's version of events, the reasoning of *Mijares* applies and the defense of transitory possession is applicable. *Brown*, which explicitly stated that it decided only the case before it and did not purport to state a rule covering possession of a weapon in prison under *all* circumstances, does not suggest the contrary.

We turn now to the question of whether the defense of transitory possession was supported by substantial evidence.

Substantial evidence in this context is "evidence sufficient for a reasonable jury to find in favor of the defendant ...." (*People v. Salas* (2006) 37 Cal.4th 967, 982.) "The threshold is not high; it does not include a predetermination by the court of the credibility of witnesses and what evidence it believes or disbelieves. [Citation.]" (*People v. Cole* (2007) 156 Cal.App.4th 452, 484.) """"Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused."""" (*Ibid*.) "On review, we determine independently whether substantial evidence to support a defense existed." (*People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1055.)

As indicated above, under appellant's version of events, the defense of transitory possession applies. The People assert that appellant's account should not be credited because his testimony that he thought he threw the blade on the floor is contradicted by the officer's testimony that the blade was found on appellant's bed, and appellant's claim that he grabbed the blade out of concern for Hernandez is belied by his actions, including going back to his bunk and not trying to get help and "ma[king] no effort to explain the situation" when officers finally entered the cell.

We note initially the People's claim that appellant made no effort to "explain the situation" is contradicted by the record; appellant testified he told one of the officers Hernandez had cut himself, and that the officer told him to be quiet. But more

fundamentally, the People's claim fails because it is no more than an attack on appellant's credibility. On this record, given appellant's testimony, the defense of transitory possession is supported by substantial evidence, it is not inconsistent with appellant's defense and therefore the court erred in failing to instruct on the defense. (*People v. Salas*, *supra*, 37 Cal.4th at p. 982 ["In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt'"].)

The question remains whether the error was prejudicial, and to resolve this question, we must first determine the appropriate standard of review. The parties do not cite, and we have not found, any United States Supreme Court or California Supreme Court case deciding the question of whether a failure to instruct sua sponte on a defense in a criminal case violates any provision of the United States Constitution (e.g., right to present a defense, right to a jury trial, right to due process, etc.), which would require application of the *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*) test for prejudice (i.e., reversal required unless error was harmless beyond a reasonable doubt) instead of the less rigorous *People v. Watson* (1956) 46 Cal.2d 818 test for prejudice (i.e., reversal not required unless it is reasonably probable the defendant would have obtained a more favorable result had the error not occurred). In fact, in 2006, the California Supreme Court stated, "We have not yet determined what test of prejudice applies to the failure to instruct on an affirmative defense." (*People v. Salas*, *supra*, 37 Cal.4th at p. 984.)

Appellant argues the error is of constitutional dimension and therefore the *Chapman* standard applies. The People make no attempt to refute this contention and indeed, offer no argument at all on the issue of whether any error was prejudicial. We agree with appellant. The Due Process Clause of the Fourteenth Amendment to the

Unites States Constitution "require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense." (*California v. Trombetta* (1984) 467 U.S. 479, 485.) That opportunity is denied when the court fails to instruct on an affirmative defense that is supported by substantial evidence. (Cf. *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1445 [finding a due process violation in trial court's refusal to allow defendant to rely on statute allowing possession of marijuana for medical purposes as defense to allegation of violation of obey-all-laws condition of probation].)

We turn now to the application of the *Chapman* standard. At trial, appellant had the burden of proving by a preponderance of the evidence the facts necessary to establish the transitory possession defense. (See *People v. Tewksbury* (1976) 15 Cal.3d 953, 964-965 [where affirmative defense does not negate element(s) of an offense, defendant has burden of establishing factual basis of defense by preponderance of the evidence]; *People v. Bolden* (1990) 217 Cal.App.3d 1591 [same]; CALCRIM No. 2510 [requiring defendant to prove by preponderance of evidence facts necessary to establish transitory possession defense to charge of possession of firearm by person prohibited due to conviction].) And, as indicated above, *Chapman* "requires the People, in order to avoid reversal of the judgment, to 'prove beyond a reasonable doubt that the error ... did not contribute to the verdict obtained.'" (*People v. Mower* (2002) 28 Cal.4th 457, 484.) Thus, the question before us is: Can the People prove beyond a reasonable doubt that a properly instructed jury would have found that appellant failed to establish by a preponderance of the evidence the facts necessary for the transitory possession defense, i.e., that he (1) possessed the razor blade for a momentary or transitory period; (2) possessed it in order to abandon, dispose of or destroy it; and (3) did not intend law enforcement officials from seizing the razor blade? Only if the People can do so, is the error harmless. If not, reversal is required.

There are two parts to the answer to this question: First, appellant's testimony that he immediately tossed the razor blade away after grabbing it from Hernandez was central to his defense to the aggravated assault charge, and it is evident that the jury, in finding reasonable doubt as to the assault charge, did not reject that testimony. It follows from this that the People cannot prove beyond a reasonable doubt that the jury, had it been instructed on the transitory possession defense, would have rejected appellant's testimony on this point in considering the weapon possession charge. Thus, we cannot conclude beyond a reasonable doubt that a properly instructed jury would have found that appellant failed to establish by a preponderance of the evidence that, *as of the moment he tossed the blade away*, he had established the elements of the transitory possession defense.

However, our inquiry does not end here. As indicated above, Officer Arnold testified he found a razor blade on appellant's bunk, where appellant, according to his testimony, went and sat after he took the blade from Hernandez. Appellant must account for this evidence because it strongly suggests *he* was responsible for the blade's presence on his bunk. If that is the case, his possession was not transitory—he would have had to possess the blade long enough to get it to his bunk—and the inference would be strong that he did not intend to abandon, dispose of or destroy the blade; under those circumstances, the transitory possession defense would not be established. And given the absence of any evidence that anyone else entered the cell before Officer Arnold, and the strong inference that Officer Arnold arrived on the scene very soon after appellant and Hernandez were removed from the cell, there is no credible evidence of the blade's presence on appellant's bunk other than Officer Arnold's testimony. Therefore, to prevail on his defense, appellant would have to establish by a preponderance of the evidence that Officer Arnold testified untruthfully.

The success of the transitory possession defense, then, depends on a credibility determination that pits appellant's testimony against that of Officer Arnold. Appellant

testified he had no idea how the blade got on his bunk, thus, implicitly denying he put it there. Officer Arnold's testimony, if true, in essence refutes appellant's claim. Applying *Chapman*, we must ask: Can the People prove beyond a reasonable doubt that a properly instructed jury would have credited Officer Arnold's testimony and rejected appellant's testimony that he had no idea how the blade got on his bunk?

In arguing the People cannot carry this burden, appellant asserts the fact that the jury acquitted him of the assault charge makes it "clear that the jury resolved [the] issues of credibility in favor of believing appellant and his cell mate versus the testimony of corrections staff witnesses." However, appellant greatly overstates the relevance of his acquittal on the assault charge to how the jury might have viewed the evidence on the weapon possession charge. Appellant's testimony that he grabbed the blade and immediately tossed it away was consistent with Hernandez's testimony, and, thus, Hernandez's testimony contributed to the showing of reasonable doubt as to the assault charge. Appellant's testimony that he had no idea how the blade got on the bunk, however, was not corroborated by other evidence. Moreover, as to appellant's attack on the credibility of the corrections officers who testified, it does not necessarily follow from the acquittal on the assault charge that, as defense counsel argued at length during closing argument and as appellant asserts now on appeal, Officer Kalkis testified untruthfully regarding Hernandez's account of events soon after the incident. Finally, it is the credibility of Officer Arnold, not Officer Kalkis, that is relevant to the issue before us now.

But these factors notwithstanding, we note the following: The question of whether the instructional error was prejudicial turns on a credibility determination; the acquittal on the assault charge demonstrates the jury did not reject appellant's testimony outright; "the direct testimony of a single witness is sufficient to [prove a fact in dispute] unless the testimony is physically impossible or its falsity is apparent 'without resorting to

inferences or deductions'" (*People v. Cudjo* (1993) 6 Cal.4th 585, 608); and the burden imposed on the People by *Chapman* is a heavy one. On this record, we cannot say *beyond a reasonable doubt* that a properly instructed jury would have resolved this credibility question in favor of Officer Arnold and against appellant. Accordingly, the People have not carried their heavy burden of proving the error was harmless. Reversal is therefore required.

DISPOSITION

The judgment is reversed.